

## **REMARKS**

Without waiving the doctrine of equivalents, and although the terms lip and spout are clearly different in both common usage and in the context of the claim, the Applicant has amended claim 1 to more clearly define the invention has having a lip that is separate from the spout. Further since the Examiner clearly considered both terms in his search, no new search is necessitated by the amendment. Thus, the characterization of the next office action, if any, as “final” would be improper.

### ***Objection to Drawings Under 35 USC §112***

The drawings stand objected to under 37 CFR 1.83(a). The Examiner states that skids and channels, and buckets and loops must be designated in various figures. The Applicant respectfully traverses the objection for at least the following reasons. First, the Examiner mischaracterizes the statute as stating, “every feature of every claim must be shown in the drawings.” Such words appear nowhere in 37 CFR 1.83(a). Rather, 37 CFR 1.83 states, in fact, that drawings must be furnished “where *necessary for the understanding of the subject matter* sought to be patented.” The Examiner does not allege that a drawing is necessary for the understanding of the polygonal shape feature. Moreover, skids, channels, buckets and loops are known to persons with ordinary skill in the art<sup>1</sup> and is understood from a reading of the specification and claims, without the assistance of drawings. In addition, the examiner here states that skids and channels, and buckets and loops are unknown, yet when the Examiner evaluates the claims, he declares not only that such elements are know, but even the manner in which they are called out in the elements is known in the art--clearly the Examiner cannot have it both ways. Nevertheless, it is noted that drawings are exemplary, and that channels (322) and buckets (350) are shown in the drawings. Thus, the objection to the drawings under 37 CFR 1.83(a) should be withdrawn, and such withdrawal is respectfully requested.

### ***Objection Under 35 USC §112***

The Examiner rejects claims 3 and 13 under 35 USC 112. Regarding claim 3, the Examiner alleges that it is unclear how the channel is disposed in the lower portion of the front of the bucket. The Applicant maintains that upon reading the specification such placement is readily apparent to one of ordinary skill in the art. Regarding claim 13, the Examiner alleges that it is unclear how the braces are constructed. The Applicant maintains that the method of constructing the braces is irrelevant, and that anyway such method of construction, upon reading the specification, is readily apparent to one of ordinary skill in the art.

The Examiner rejects claim 8 under 35 USC 112. The examiner states that “the cut of the conical section” lacks an antecedent basis. However, it is readily understood not only in the art, but in every mechanical art, that a conical section necessarily has a cut, otherwise, it would be a cone.

Accordingly, it has been shown that the rejections to claims 3, 13 and 8 under 35 USC 112 are improper, and the withdrawal of the rejections is respectfully requested.

### ***Rejections Under 35 USC §102***

Claims 1, 5, 6, 7, 8, 10, and 12 stand rejected under 35 USC §102 in view of *Pettersson* or *Gesuale*. The Examiner incorrectly notes that the lips of *Pattersson* and *Gesaule* “broadly” comprise a pourer portion. Such readings are impermissibly broad, especially in light of the fact that such a reading would render the reading of claim 1 as having two identically named elements with different structure and position, and would render one of the words meaningless. In fact, it is noted that not even the Examiner read the claim in the manner he suggests. Nevertheless, though superfluous, the applicant has amended claim one to more clearly define that the lip is separate from the pourer and takes the claims out of 35 USC 102. Accordingly, it is improper to maintain the rejections and withdrawal of the rejections is respectfully requested.

## **Cautions when entering rejections under 35 USC 102**

The Applicant respectfully brings to the Examiner's attention various limitations of rejections under 35 USC 102, in the hope that such rejections in the future, if entered, may at least raise a *prima face* case of rejection (and for the following reasons the present rejections fail to raise a *prima face* case of rejection).

### **I. Requirement for Examiner to Rely on Single Reference**

On the law of anticipation, Judge Learned Hand stated:

No doctrine of the patent law is better established than that a prior patent or other publication to be an anticipation must bear within its four corners adequate directions for the practice of the patent invalidated. *Dewey & Almy Chem. Co. v. Mimex Co.*, 124 F.2d 986, 989 (2d Cir. 1942).

Accordingly, the Examiner may rely on only a single reference, and the single reference must show each and every element as set forth ("arranged") in the claim. *Lindemann Maschinenfabrik GmbH v. American Hoist & Derrick Co.*, 730 F.2d 1452 (Fed. Cir. 1984).

### **II. Requirement of Enablement to Qualify as a Reference**

Further, the reference relied upon must be enabling. In *Paperless Accounting, Inc. v. Bay Area Rapid Transit Systems*, 804 F.2d 659, 665 (Fed Cir. 1986): "[A] §102(b) reference must sufficiently describe the claimed invention to have placed the public in possession of it . . . [E]ven if the claimed invention is disclosed in a printed publication, that disclosure will not suffice as prior art if it was not enabling . . ." See also, *Akzo N.V. v. U.S.I.T.C.*, 808 F.2d 1471, 1479 (Fed. Cir. 1986) ("the prior art reference must be enabling. . ."). The reference must be enabling with respect to the claimed invention (as opposed to the underlying device or method taught in the reference). If the reference is inoperative with respect to the claimed invention, then the reference does not teach the invention and is not prior art. *In re Shepard*, 172 F.2d 560 (C.C.P.A. 1949). None of the cited references could effectively directionally pour concrete or any other liquid. A non-enabling reference must not even be considered as a reference. *In re*

*Wilder*, 429 F.2d 447 (C.C.P.A. 1964).

### III. Factual Basis for a Rejection

To establish a Prima Facie basis for anticipation, the Examiner bears the burden to show the factual basis of the anticipation rejection. *In re Warner*, 379 F.2d 1011, 389 U.S. 1057 (1968). Such basis must be both factually sufficient, **and reasonable**.

In addition, to establish a prima face case of anticipation, the Examiner further bears the burden to first show a correct interpretation, including the scope and meaning, of each contested limitation. *Gechter v. Davidson*, 116 F.3d 1454 (Fed. Cir. 1997). This is required, in part, so that the Applicant can ascertain whether or not the Examiner understands the invention, and so that the Applicant can frame a response. 37 CFR 1.106(b). **Of course, the interpretation must rely on teachings found within the four corners of the reference.** *Dewey & Almy Chem. Co. v. Mimex Co.*, 124 F.2d 986, 989 (2d Cir. 1942).

#### 1. Example: The Examiner Failed to define the scope and meaning of each limitation

The Examiner does not define the “scope and limitation” of pourer. Accordingly, the definitions of the elements are limited to the definitions expressly taught by the references. Of course, neither reference teaches a pourer, so neither reference raises a proper rejection under 35 USC 102.

Under MPEP § 2131, a claim is anticipated if and only if each and every element as set forth in the claim is found either expressly or inherently described in a single prior art reference. *Verdegaal Bros. v. Union Oil Co. of California*, 814 F.2d 628, 631 (Fed. Cir. 1987). “The identical invention must be shown in as complete detail as in the \_\_\_\_ claim.” *Richardson v. Suzuki Motor Co.*, 868 F.2d 1226, 1236 (Fed. Cir. 1989). The Examiner must interpret meaning of words in light of the specification. *Gechter v. Davidson*, 116 F.3d 1454 (Fed. Cir. 1997).

## 2. Beware of Mischaracterizations

Under MPEP § 2131, a claim is anticipated if and only if each and every element as set forth in the claim is found either expressly or inherently described in a single prior art reference. *Verdegaal Bros. v. Union Oil Co. of California*, 814 F.2d 628, 631 (Fed. Cir. 1987). “The identical invention must be shown in as complete detail as in the claim.” *Richardson v. Suzuki Motor Co.*, 868 F.2d 1226, 1236 (Fed. Cir. 1989). **The Examiner must interpret meaning of word in light of the specification.** *Gechter v. Davidson*, 116 F.3d 1454 (Fed. Cir. 1997). As noted above, none of the references discuss a pourer, and the pourer of the invention must be interpreted in light of the specification where it is clear that the lip and the pourer are separate.

## V. Summary, Conclusion and Prayer for Relief

If the examination at the initial stage does not produce a prima face case of unpatentability, then without more the applicant is entitled to a grant of the patent. *In re Oetiker*, 977 F.2d 1443 (Fed. Cir. 1992). Accordingly, the Examiner is respectfully requested to withdraw all rejections under 35 USC §102.

### *Rejections Under 35 USC §103*

The Examiner rejects claims 1-4, 8 and 11 under 35 USC 103 as being obvious under *Deye* in view of either *Pettersson* or *Gesuale* in further view of *Slagter*. For the following reasons, the rejections under 35 USC 103 do not raise a prima face case of obviousness, are improperly applied, and should be withdrawn.

### 1. There Must Be a Basis in the Art for Combining or Modifying References

MPEP§ 2143.01 provides:

The mere fact that references can be combined or modified does not render the resultant combination obvious unless the prior art also suggests the desirability of the combination. *In re*

*Mills*, 916 F.2d 680, 16 USPQ2d 1430 (Fed. Cir. 1990).

The Federal Circuit has several times expressly addressed the issue of how to evaluate an alleged case of *prima facie* to determine whether it has been properly made. Thus, *In re Geiger*, *supra*, stated, in holding that the PTO “failed to establish a *prima facie* case of obviousness”:

Obviousness cannot be established by combining the teachings of the prior art to produce the claimed invention, absent some teaching, suggestion or incentive supporting the combination. *ACS Hospital Systems, Inc. v. Monteffiore Hospital*, 732 F.2d 1572, 221 USPQ 929,933 (Fed. Cir. 1984).

Of course, application of §103 presumes the existence of differences between the subject matter claimed and the teachings of any particular prior art reference. Otherwise, a rejection under §102 would have sufficed. Thus, the Examiner must propose some modification of a particular reference or a combination thereof with another reference in order to arrive at the claimed invention. The Federal Circuit’s assessment in *Geiger*, quoted above, is directed to the sufficiency of the teachings of a particular reference to justify a conclusion that any proposed modification or combination of references is what one of ordinary skill in the art would have found obvious to do at the time the invention was made.

Recently, Judge Newman in her opinion in *In re Lee*, 277 F3d. 1338, 1343, 61 USPQ2d 1430, (Fed Cir. 2002) repeats this fundamental principle:

When patentability turns on the question of obviousness, the search for and analysis of the prior art includes evidence relevant to the finding of **whether there is a teaching, motivation, or suggestion to select and combine the references** relied on as evidence of obviousness.

Judge Newman went on to advise the PTO that it cannot meet that test by simply saying

that the basis for combining references comes from” common knowledge” or is “common sense”, viz:

The “common knowledge and common sense” on which the Board relied in rejecting Lee’s application are not the specialized knowledge and expertise contemplated by the Administrative Procedure Act...The Board’s findings must extend to all material facts and must be documented on the record, lest the “haze of so-called expertise” acquire insulation from accountability. “Common knowledge and common sense”, even if assumed to derive from the agency’s expertise, do not substitute for authority when the law requires authority. *Id.*

The CCPA earlier expressly held that there must be some logical reason apparent from the evidence of record that would justify a combination or modification of references. *In re Regel*, 188USPQ 132 (CCPA 1975). In determining whether one of ordinary skill in the art would find it obvious to modify or combine references, the teachings of the reference taken with the knowledge that a worker in the art already possesses constitute the scope and content of the prior art that is referred to in the *Graham* decision. Thus, the question raised under § 103 is whether the prior art taken as a whole would suggest the claimed invention taken as a whole to one of ordinary skill in the art. Accordingly, even if all elements of a claim are disclosed in various prior art references, the claimed invention taken as a whole cannot be said to be obvious without some reason given in the prior art why one of ordinary skill would have been prompted to combine the teachings of the references to arrive at the claimed invention. *In re Regel, supra.* If there is not then the Examiner has not met the burden of establishing a prima facie case of obviousness, and it becomes a task of the practitioner to traverse the rejection by way of denying the existence of a *prima facie* case of obviousness. Accordingly, the Applicant hereby denies the existence of a *prima facie* case of obviousness.

The Federal Circuit has also repeatedly warned against using the applicant’s disclosure as a blueprint to reconstruct the claimed invention out of isolated teachings in the prior art. *See,*

*e.g.*, *Grain Processing Corp. v. American Maize-Products*, 840 F.2d 902, 907, 5 USPQ2d 1788, 1792 (Fed. Cir. 1988).

For example, the black letter law statements by Judge Linn in *In re Kotzab*, 217 F.3d 1365, 55 USPQ2d 1313 (Fed. Cir. 2000) address this subject, *viz*:

a) Hindsight Syndrome

A critical step in analyzing the patentability of claims pursuant to section 103(a) is casting the mind back to the time of invention, to consider the thinking of one of ordinary skill in the art, guided only by the prior art references and the then-accepted wisdom in the field. . . . Close adherence to this methodology is especially important in cases where the very ease with which the invention can be understood may prompt one “to fall victim to the insidious effect taught is used against the teacher.” (*Id.* At 1369, 55 USPQ2d at 1316) (citations omitted).

b) Need for Motivation

Most if not all inventions arise from a combination of old elements. ... Thus, every element of a claimed invention may often be found in the prior art. *See id.* However, identification in the prior art of each individual part claimed is insufficient to defeat patentability of the whole claimed invention. *See id.* Rather, to establish obviousness based on a combination of the elements disclosed in the prior art, there must be some motivation, suggestion or teaching of the desirability of making the specific combination that was made by the applicant. (*Id.* at 1369, 55 USPQ2d at 1316) (citations omitted).

(c) Particular Findings Required

The motivation, suggestion or teaching may come explicitly from statements in the prior art, the knowledge of one of ordinary skill in the art, or, in some cases the nature of the problem to be solved. In addition, the teaching, motivation or suggestion may be implicit from the prior art as a whole, rather than expressly stated in the references. ... The test for an implicit showing is what the combined teachings, knowledge of one of ordinary skill in the art, and the nature of



the problem to be solved as a whole would have suggested to those of ordinary skill in the art. ... Whether the Board relies on an express or an implicit showing, it must provide particular findings related thereto. Broad conclusory statements standing alone are not “evidence.” (*Id.* at 1370, 55 USPQ2d 1317) (citations omitted).

The Examiner does not provide a single motivation for either combining *Deye* with either *Pettersson* or *Gesuale*, or for adding yet another piece of art, *Slagter*. Nor does the Examiner identify what changes are being made to *Deye* to achieve the invention as defined in the claims. The Applicant is thus left to guess the nature of the alterations and to guess the motivations for alterations. This is clearly contrary to above cited law that requires the Examiner to specifically define elements, specifically identify alterations and the motivations for making the alterations, and to specifically identify motivation for making combinations. However, there are no findings that would justify a motivation to modify *Deye* to achieve any of the teachings of invention, much less the teachings in claim 1. Nor does the examiner identify the source for a motivation to combine *Deye* with *Pettersson* or *Gesuale*, or *Slagter* to achieve the teachings of any of the rejected claims. Further, the Examiner does not provide any findings to justify the modifications or combinations. Accordingly, no *prima facie* case of anticipation has been shown, and withdrawal of the rejections based on Rodgers under 35 USC 103 is respectfully requested.

## **2. References Are Not Properly Combinable or Modifiable if the Reference(s) Teach Away From the Modification or Combination**

If the prior art teaches away from a combination, then a §103 rejection does not rise to the dignity of *prima facie* obviousness. It is unnecessary to submit rebuttal evidence when the reference used to reject the claim teaches away from the limitation, or is silent on it and other art teaches away. In short, teaching away is the antithesis of the art suggesting that the person of ordinary skill go into the claimed direction. *In re Fine*, 873 F.2d 1071, 5 USPQ 2d 1596 (Fed. Cir. 1988). Essentially, teaching away from the art is a per se demonstration of lack of *prima facie* obviousness.

*In re Hedges*, 783 F.2d 1038, USPQ 685 (Fed. Cir. 1986), is a good example of the Federal Circuit's contribution to the subject. Hedges has stressed to the PTO that his invention incorporated the reaction to diphenyl sulfone at a temperature above its melting point of 127° C. Hedges argued before the board that the lower temperature shown by the prior art defeats any *prima facie* case of obviousness. The board held that Hedges had not produced "persuasive objective evidence" in rebuttal. The board thus considered the references to define a *prima facie* case which was not rebutted.

On appeal, the Federal Circuit pointed out that "only after the PTO had made a *prima facie* case of obviousness does the burden of coming forward shift to the applicant..." Judge Newman determined that the basic reference alone does not, as asserted by the PTO, support a *prima facie* case of obviousness. She observed that the reference (Felix) makes clear that low temperatures are the desired conditions for the claimed reaction.

The fact that *Deye*, *Pettersson*, *Gesuale*, and *Slagter* are each independently created solutions to an identified problem, indicates that absent impermissible hindsight reasoning, there is no motivation to combine the references. Accordingly, no *prima facie* case is created, and the rejections under 35 USC 103 should be withdrawn and withdrawal of the same is requested.

Nevertheless, neither *Deye*, *Pettersson*, *Gesuale*, or *Slagter*, alone or in combination, teach show or suggest a loader attachment for a loader having a plurality of skids where the attachment controllably pours a material from the bucket where the attachment comprises a bucket configured for attachment to a loader, the bucket having a front and a rear, a pourer portion, separate from the lip and extending from the lip, coupled to the front of the bucket at the top of the bucket, and a skid adaptor configured at the rear of the bucket. Accordingly, the rejections under 35 USC 103 should be withdrawn and withdrawal of the same is requested.

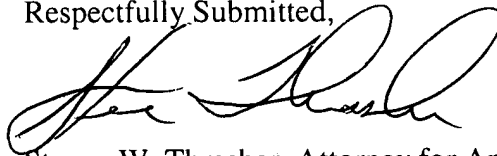
***In the Event Arguments are Believed Insufficient***

The Examiner is thanked for his consideration. Should the Examiner disagree that the remarks place the application in condition for allowance, then the Examiner is respectfully requested to prepare an acceptable proposed set of claims pursuant to MPEP 707.07 (j).

Thus, it is believed that the pending claims are allowable, and allowance of said claims is respectfully requested. Other references made of record but not relied upon in the Office Action are considered no more relevant to the invention than the reference relied upon by the Examiner.

If the Examiner has other matters which remain, the Examiner is encouraged to contact the under signed attorney to resolve these matters by Examiners Amendment where possible.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read 'Steven W. Thrasher', written in a cursive style.

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